

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBYN EVANS and DENNIS J. BARELA,) No. C-05-3968 SC
on behalf of themselves)
individually, and all others)
similarly situated,) ORDER GRANTING
) DEFENDANT'S MOTION TO
) DISMISS
Plaintiffs,)
v.)
CHASE MANHATTAN BANK USA, N.A.,)
Defendant.)

I. INTRODUCTION

Robyn Evans and Dennis J. Barela ("Plaintiffs"), on behalf of themselves and all others similarly situated, allege that Chase Manhattan Bank USA, N.A. ("Chase" or "Defendant") improperly increased interest rates on credit card accounts in default, violating the Truth in Lending Act ("TILA"), the Cardmember Agreement, as well as state contract and fraud laws.

Presently before the Court is Chase's motion to dismiss Plaintiffs' eight claims pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). The Court, having reviewed the parties' submissions, hereby GRANTS Defendant's motion to dismiss.

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II. BACKGROUND

Except as noted, the following allegations are taken from Plaintiffs' papers and will be assumed as true for purposes of the present motion.

Plaintiffs have two central grievances. First, Plaintiffs allege that Chase, without advance notice, increased cardmembers' interest rates because of a "single late payment to Chase, or...a reported late payment to some other creditor." Complaint ¶ 2 ("Compl.").¹ Because Chase failed to give advance notice of a rate increase, customers in default often "do not become aware of rate increases for an extended period of time, and some customers never discover such increases or find out the reasons therefor." Id. ¶ 17. The unfairness of this action is increased because Chase, Plaintiffs allege, fails to verify the accuracy of off-Chase delinquencies, thereby increasing rates based on false or inaccurate information. Id. ¶¶ 19, 20.

Second, Plaintiffs bewail Chase's practice of backdating the rate increase to the beginning of the billing cycle. Id. ¶ 9. Such unannounced and furtively applied rate increases are "unfair, unconscionable, and punitive." Id. ¶ 20. Because these rate increases are imposed in addition to other late fees, "they constitute illegal penalties." Id. ¶ 12.

Plaintiffs articulated these grievances in the Complaint.²

¹ Plaintiff calls the first type an "on-Chase" delinquency and the second an "off-Chase" delinquency. Compl. at 4.

² It should be noted that Plaintiffs' counsel, Brian R. Strange, filed an action in March 2005 in the Superior Court for the County of Orange, California alleging similar claims against

The Complaint alleges that (1) Chase violated TILA, (2) Plaintiffs are owed declaratory relief and damages, (3) the Court should sever the unconscionable contract terms, (4) the Court should declare that Chase is imposing and enforcing an illegal penalty, (5) Chase committed consumer fraud, (6) Chase breached its contract with Plaintiffs, (7) Chase breached the covenant of good faith and fair dealing, and (8) Chase's actions constitute unfair and deceptive practices under California law. Compl. at 25-26.³

III. LEGAL STANDARD

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "In reviewing a 12(b)(6) motion, this Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996); see also Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The complaint need not set out the facts in detail; what is required is a "short and plain statement of the claim showing that the pleader is entitled to

Chase, but with Faith Dugan and Jeanine Hill named as plaintiffs. See Defendant's Request for Judicial Notice in Support of Motion to Dismiss and Sanction, Ex. A at 1. Chase removed the case to Federal Court in the Central District of California. See Defendant's Memorandum in Support of Motion to Dismiss at 1. The Honorable Cormac J. Carney granted Chase's motion to dismiss with leave to amend. Id. Dugan and Hill filed an amended complaint and then voluntarily dismissed it in August 2005. Id., Ex. D at 1.

³ The Complaint has two pages marked with "25." The second "25" is the 26th page.

1 relief." FRCP 8(a); see also La Salvia v. United Dairymen, 804
2 F.2d 1113, 1116 (9th Cir. 1986). Thus, the Court's task "is
3 merely to assess the legal feasibility of the complaint, not to
4 assay the weight of the evidence which might be offered in support
5 thereof." Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998).

6 **IV. DISCUSSION**

7 A. First Claim: Violations of TILA

8 Plaintiffs contend that Chase violated Regulation Z of TILA,
9 12 C.F.R. § 226.9(c), by "failing to notify its customers of
10 increases in interest rates on or before the effective date of the
11 change." Compl. ¶ 25. Plaintiffs bolster their contention by
12 pointing to the fact that the APR increases are discretionary, are
13 based on unknown factors, and are applied retroactively.
14 Plaintiffs' Memorandum in Opposition to Motion to Dismiss at 7-8
15 ("Pls' Mem.").

16 Chase contends that Plaintiffs "misconstrue the scope of the
17 notice provisions in Regulation Z," which, Chase asserts, does not
18 apply to the facts at hand. Defendant's Memorandum in Support of
19 Motion to Dismiss at 5 ("Def's Mem."). Specifically, Chase
20 contends that "Plaintiffs point to no change in Chase's terms.
21 Rather, the increases complained of are the implementation of
22 terms explicitly disclosed to Plaintiffs." Id.

23 Regulation Z, 12 C.F.R. § 226.9(c)(1), requires creditors to
24 notify consumers whenever "any term required under § 226.6 is
25 changed." The Official Staff Commentary to Regulation Z
26 ("Commentary"), requires Chase to provide written notice "if there
27 is an increased periodic rate or any other finance charge
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1 attributable to the consumer's delinquency or default." 12 C.F.R.
2 pt. 226, Supp. I, § 226.9 (c)(1), cmt. 3.⁴ The Commentary goes on
3 to state, however, that "[n]o notice of a change in terms need be
4 given if the specific change is set forth initially, such as:
5 [r]ate increases under a properly disclosed variable-rate plan."
6 12 C.F.R. pt. 226, Supp. I, § 226.9(c), cmt. 1.

7 Under the Cardmember Agreement, Chase "may vary" a
8 cardmember's Annual Percentage Rate ("APR") if certain
9 circumstances exist, including if the cardmember is "in default
10 under this agreement...[or if he] fail[s] to make a payment to
11 another creditor when due." Declaration of Melissa Beck in
12 Support of Defendant's Motion to Dismiss, Ex. B at 3 ("Beck
13 Decl."). The Cardmember Agreement also states that the "default
14 rate will take effect as of the first day of the billing cycle in
15 which the default occurs, and will apply to purchase balances from
16 the previous billing cycle for which periodic finance charges have
17 not been already billed." Id.

18 The Court finds that Plaintiffs have failed to allege facts
19 sufficient to sustain their claim under TILA. The Commentary, as
20 stated above, states that creditors need not give notice if the
21 specific change is set forth initially, such as in a variable rate
22 plan. The Cardmember Agreement gives cardmembers notice of these
23 changes.

24 On a final note, the Court is unimpressed by Plaintiffs'

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26 ⁴ The Commentary, which is put forth by the Board of Governors
27 of the Federal Reserve System is entitled to a great deal of
28 deference. See Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219
(1981).

1 complaints that the rate increases are discretionary, that they
2 are based on unknown factors, and that the rate increases are
3 retroactive. These complaints have nothing to do with Regulation
4 Z's notice requirements. The Official Staff Commentary to
5 Regulation Z states that "notice must be given if the contract
6 allows the creditor to increase the rate at its discretion but
7 does not include specific terms for an increase." 12 C.F.R.
8 pt. 226, Supp. I, § 226.9(c), cmt. 1. According to the
9 Commentary, because Chase's Cardmember Agreement discloses the
10 specific terms for its increases, it is not bound by Regulation
11 Z's notice requirements.⁵ Similarly, because Chase gives the
12 reasons for its rate changes, Plaintiffs' contention that they are
13 based on unknown factors is simply not accurate. Finally, that
14 Chase applies rate increases retroactively is disclosed by the
15 Cardmember Agreement.

16 The Court grants Defendant's motion and dismisses Plaintiffs'
17 first claim.

18 B. Second, Third and Fourth Claims: Request for
19 Declaratory Relief, Severance of Terms, and Damages

20 Plaintiffs' second, third and fourth claims are based on the
21 alleged unconscionability of certain terms in the Cardmember
22 Agreement. See Compl. ¶¶ 33-51.

23 Plaintiffs, in these claims, contend that the terms are

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25 ⁵ Chase discloses the maximum rate it will set an APR in the
26 event of a cardmember's default. The Cardmember Agreement states
27 that "[i]f any of these [default] events occurs, we may increase
28 the APRs (including any promotional APR) on all balances up to a
maximum of the default rate stated in the Rates and Fees Schedule."
Beck Decl., Ex. B at 3.

1 unconscionable because cardmembers "have no choice with respect to
2 the inclusion of the terms of the standard credit card agreement,
3 nor the amount of the interest rate increases." Compl. ¶ 34.
4 Specifically, Plaintiffs' second claim asks the Court for a
5 "determination and a declaration that these provisions [penalizing
6 rate increases, backdating charges, basing penalties on off-Chase
7 delinquencies] constitute an illegal penalty and as such are
8 unconscionable and unenforceable," and for "damages to the extent
9 Chase has enforced the [unconscionable and illegal] terms." Id.
10 ¶ 38-39. Plaintiffs' third claim asks the Court to sever the
11 unconscionable contract terms and for appropriate damages. Id.
12 ¶¶ 44-45. Plaintiffs' fourth claim asks the Court for an order
13 "preliminarily and permanently enjoining Chase from further
14 enforcement and collection of [improperly] increased finance
15 charges." Id. ¶ 51. Plaintiffs also ask the Court to order Chase
16 to make restitution and disgorge its profits. Id.

17 Chase contends that the provisions cannot be unconscionable
18 because they are "authorized by the law of Chase's home state,
19 Delaware." Def's Mem. at 7.

20 The Cardmember Agreement states that the terms of the
21 agreement "shall be governed and interpreted in accordance
22 with...the law of Delaware." Beck Decl., Ex. B at 6. Under
23 Delaware law, a "contract of adhesion may be declared
24 unenforceable, in whole or in part, if its terms are
25 unconscionable within the meaning of 6 Del.C. § 2-302." Del.
26 C. § 2-302 states that the court must determine whether a contract
27 or clause is unconscionable as a matter of law.

1 Section 944 of the Delaware Banking Act, 5 Del. C. § 944,
2 states that "[i]f the agreement governing the revolving credit
3 plan so provides, the...rates of interest under such plan may vary
4 in accordance with a schedule or formula." The Delaware Banking
5 Act states that:

6 a permissible schedule or formula may include provision in
7 the agreement governing the plan for a change in...rates of
8 interest applicable to all or any part of outstanding unpaid
9 indebtedness contingent upon the happening of any event or
circumstance specified in the plan, which event or
circumstance may include the failure of the borrower to
perform in accordance with the terms of the plan.⁶

10 Id. The Cardmember Agreement, by describing what events will
11 cause default rates to go into effect, complies with these
12 requirements.

13 Therefore, the Court finds that the terms are not
14 unconscionable because they are specifically authorized by
15 statute. If Delaware law were silent as to this issue,
16 Plaintiffs' unconscionability contention may have had some weight.
17 Where, as here, Delaware law not only speaks directly to the
18 issue, but specifically authorizes the custom, the Court will not
19 declare the terms unconscionable.

21 ⁶ Plaintiffs contend that there is "no such 'schedule or
22 formula' specified in the Cardmember Agreements or otherwise
23 provided to Chase customers...Chase's rate increase in the event of
24 a default may or may not be imposed by Chase, and the amount of any
increase is discretionary. A discretionary rate increase in an
unstated amount is not a change 'in accordance with a schedule or
formula.'" Pls' Mem. at 14.

25 This analysis blinks the very words of Section 944. The
26 statute declares that a permissible formula or schedule can be
27 based on the occurrence or non-occurrence of an event or
circumstance described in the agreement, such as we see in the
Cardmember Agreement.

1 Plaintiffs' assertion that the terms are unconscionable
2 becomes, then, to a challenge of the law itself. Unless a law is
3 found to be constitutionally infirm, it is legitimate and
4 enforceable, however unfair the law may seem to allegedly
5 aggrieved persons. Plaintiffs have not contended that the statute
6 is unconstitutional or otherwise infirm.

7 There are three points the Court wishes to address as a coda
8 to its dismissal of Plaintiffs' second, third and fourth claims.

9 First, the Court finds no merit in Plaintiffs' contention
10 that the rate increases are "unenforceable penalties." Pls' Mem.
11 at 17. To support their contention, Plaintiffs cite a nineteenth-
12 century Nebraska Supreme Court case and a 1999 New Jersey Supreme
13 Court case. Id. at 18. For obvious reasons, the Court will not
14 concern itself with those cases. The only possibly relevant case
15 Plaintiffs mention, S.H. Deliveries v. Tristate Courier &
16 Carriage, 1997 Del. Super LEXIS 217 (Del. Super. Ct., July 16,
17 1997), an unpublished case, concerns the question whether a
18 stipulated sum provision in a contract constitutes liquidated
19 damages or a penalty. This case is inapposite to the facts of the
20 instant action.

21 Second, Plaintiffs declare that under 6 Del. C. § 2-302(2),
22 the "question of whether a contractual provision is unenforceable
23 requires an evidentiary hearing." Pls' Mem. at 19. The Court
24 finds no such requirement in the statute. Furthermore, the Court
25 has already determined that an allegation of unconscionability is
26 a challenge to the law itself, a challenge Plaintiffs have not
27 formally brought.

1 Third, the Court is unmoved by Plaintiffs' statement that
2 they "do not contend that the 'default' interest rates imposed by
3 Chase are unlawful in and of themselves. Rather, it is the manner
4 in which the increases are imposed to which plaintiffs object."
5 Pls' Mem. at 17. "This manner directly violates federal laws,
6 Delaware laws, and Chase's own contracts." Id.

7 The Court has already addressed these contentions. The Court
8 determined previously that, based on the alleged facts, Chase's
9 actions do not violate federal law. As stated previously,
10 Plaintiffs have not alleged sufficient facts that the manner
11 violates Delaware laws or the contract.

12 Because the Court finds that the terms are not unconscionable
13 under the facts pled, the Court dismisses Plaintiffs' second,
14 third, and fourth claims.⁷

15 C. Fifth Claim: Consumer Fraud under Delaware Law

16 Plaintiffs claim that Chase's actions (i.e., failure to
17 timely notify customers about increased APRs, apply rate increases

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19 ⁷ In their opposition, Plaintiffs appear to allege that
20 Chase's "practices for off-Chase delinquencies violate the Fair
Credit Reporting Act." Pls' Mem. at 19-20.

21 Federal Rule of Civil Procedure 7(a) allows for the following
22 forms of pleading: a complaint, an answer, a reply to a
23 counterclaim, an answer to a cross-complaint, a third-party
complaint, and a third-party answer. "No other pleading shall be
allowed, except that the court may order a reply to answer or a
third-party answer." Id.

24 In the instant case, if this is a new claim, this is the first
25 the Court has heard of it. If this is a new claim, the Court will
26 not address it because it has not been properly brought before the
Court through an appropriate form of pleading required by Federal
Rule of Civil Procedure 7(a).

1 retroactively, concealment of how new APRs are determined, use of
2 off-Chase defaults) constitute consumer fraud under the Delaware
3 Consumer Fraud Act, 6 Delaware Code §§ 2511-2527. See Compl.
4 ¶¶ 52-59 to 18-21.

5 Chase contends that because Plaintiffs have failed to allege
6 any misrepresentation or omission - all terms being plainly stated
7 in the Cardmember Agreement - they cannot state a claim under this
8 statute. Def's Mem. at 12.

9 The specific statute, 6 Delaware Code § 2513(a), makes it
10 unlawful for any person to use any "deception, fraud, false
11 pretense, false promise, misrepresentation, or the concealment,
12 suppression, or omission of any material fact with the intent that
13 others rely" on the deception "in connection with the sale, lease
14 or advertisement of any merchandise."

15 The Court finds that Plaintiffs have not stated a claim for
16 consumer fraud. Rather than practicing concealment or making
17 false promises, Chase, from the beginning of the contractual
18 relationship, notifies cardmembers of the actions it may take in
19 the event of a default. Specifically, the Cardmember Agreement
20 notifies cardmembers that Chase may change a cardmember's APR,
21 that it would apply rate increases retroactively, and that it "may
22 consider" various factors in determining a new APR, such as off-
23 Chase delinquencies. Beck Decl., Ex. B at 3.

24 The Court grants Defendant's motion and dismisses this claim.

25 D. Sixth Claim: Breach of Implied Contract

26 Plaintiffs assert that because the Cardmember Agreement
27 incorporates federal law, Chase is bound by the notification
28

1 requirements of Regulation Z. Compl. ¶ 61. By failing to
2 properly notify customers as Regulation Z requires, Plaintiffs
3 contend Chase has breached an implied contract created by federal
4 law. Id.

5 The Court finds that this is a reiteration of Plaintiffs'
6 first claim and dismisses it for the same reasons. The Cardmember
7 Agreement provides notice that Chase may vary a cardmember's APR.
8 Regulation Z does not require any additional action from Chase.
9 So, even if federal law applies, Chase has not, under the facts
10 alleged, infringed it.

11 The Court grants Defendant's motion and dismisses Plaintiffs'
12 sixth claim.

13 E. Seventh Claim: Breach of the Covenant of Good Faith and
14 Fair Dealing

15 Plaintiffs contend that by taking the contested actions,
16 Chase breached the covenant of good faith and fair dealing
17 implicit in all contracts.

18 Judge Carney, as described in Footnote 2, dismissed a similar
19 claim made by Counsel Strange's previous clients by declaring that
20 "Plaintiffs' Second Cause of Action for tortious breach of the
21 implied covenant of good faith and fair dealing is deficient
22 because it seeks to imply terms into the parties' agreement that
23 are inconsistent with the express terms of their agreement and
24 impose new obligations on Defendant." Def's Req., Ex. B at 1.

25 The Court finds no reason to depart from the reasoning and
26 conclusion of Judge Carney, and therefore the Court grants
27 Defendant's motion and dismisses Plaintiffs' seventh claim.
28

F. Eighth Claim: Unfair and Deceptive Practices under California Civil Code § 1770

Plaintiffs contend that Chase's actions constitute unfair and deceptive practices under California Civil Code §§ 1770(a)(5) and (19). Compl. ¶ 74. Plaintiffs seek an order "enjoining defendant from employing the practices described in this complaint against any California resident." Id.

Plaintiffs quote the following portion of California Civil Code § 1770:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: ...Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have...Inserting an unconscionable provision in the contract.

Plaintiffs contend that Defendant's failure to notify consumers before a rate effect was put in place "constituted an implied representation that the APRs being charged had not been increased." Compl. at 24. Plaintiffs contend that by imposing retroactive rate increases Chase has "rendered its previous representations as to the characteristics of its services (namely, the APR interest rates) false." Id. ¶ 75. Finally, Plaintiffs contend that the use of off-Chase delinquencies is "unconscionable." Id.

The Court finds that Plaintiffs have not alleged facts sufficient to state a claim for unfair or deceptive acts. First, because Chase was acting under the fully-disclosed terms of the contract, its actions cannot plausibly be labeled a deception. Second, the Court has already determined that the terms are not

unconscionable.

G. Sanctions for Judge Shopping

Chase asks the Court to assess sanctions against Plaintiffs and Plaintiffs' counsel for judge-shopping. See Defendant's Request for Judicial Notice in Support of Motion to Dismiss and Sanctions.

A Court has inherent authority to sanction bad faith conduct by parties, such as judge-shopping. See Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1997).

At present, the Court declines to exercise its authority on this issue. The Court will not at present determine whether Plaintiffs or Plaintiffs' counsel engaged in judge-shopping. Accordingly, the Court will not at this time assess sanctions against Plaintiffs or Plaintiffs' counsel.

The Court, however,

V. CONCLUSION

The Court finds that Plaintiffs have not alleged facts sufficient to sustain claims of violations of TILA, state law, and contractual agreements.

Accordingly, the Court DISMISSES Plaintiffs' eight claims and thereby the Complaint and the case with prejudice.

IT IS SO ORDERED.

Dated: January 27, 2006


UNITED STATES DISTRICT JUDGE